IN THE

Supreme Court of the United States.

No. . October Term, 1943.

BERKSHIRE KNITTING MILLS,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

For Opinions-below, Jurisdiction, Statement of the Case, and Questions Presented, see pages 1 to 9 of the Petition.

I. Petitioner Has Been Deprived of a Full, Fair, Prompt and Impartial Hearing.

Due process requires a full, prompt, fair and impartial hearing before an impartial tribunal. *Morgan v. United States*, 304 U. S. 1, 14 (1938); *Ohio Bell Telephone Company v. Public Utilities Commission*, 301 U. S. 292 (1937).

A "hearing", as authorized by the Act, means "a trial by a tribunal free from bias and prejudice and imbued with the desire to accord to the parties equal consideration". *Inland Steel Co. v. N. L. R. B.*, 109 F. (2d) 9, 20 (C. C. A. 7th, 1940). This constitutional guarantee of due process has been denied the petitioner in many ways and in many instances, and the wrong can only be corrected or remedied by your Honorable Court reviewing the case on writ of certiorari and thereafter setting aside the order of the Board in its entirety and directing a hearing *de novo*.

(a) The petitioner was not permitted to submit all its material evidence.

The petitioner has endeavored to present to the Board and to the lower Court for its consideration and for the future consideration of all other reviewing courts all facts having a bearing on the issues involved in the case, but petitioner, notwithstanding its constitutional rights, has been denied such an opportunity both by the Board and the Circuit Court of Appeals for the Third Circuit.

The Special Committee of the House of Representatives Investigating Labor Board and Wagner Act disclosed relevant and material evidence concerning the activities of Edwin S. Smith, who was then a member of the Board, and of certain other representatives, agents and attorneys of the Board, which bore upon the case including the cause of the strike of 1936 and which showed biased activities by a Board member and some of its staff in connection with the proceeding against petitioner, the details of which evidence are more fully set forth in pages 4 to 6 of the foregoing petition, and completely set forth in the petitioner's petition for leave to adduce additional testimony (I, 334-403).

When the petitioner first learned of this evidence, it forthwith filed its petition in the Court below for leave to adduce such additional evidence, but, notwithstanding the materiality and relevancy of the evidence so far as concerned the prejudice, partiality and delay on the part of the Board, and the cause of the strike of 1936, the petitioner has never been permitted to introduce this evidence into the record of this case.

While the petition to adduce additional evidence was first granted by the Court below in its opinion of June 19, 1941, and its order of July 21, 1941, thereon, so far as Smith's activities were concerned, the fact remains that the testimony concerning Board member Smith was never taken through no fault of petitioner or the Board (as neither one had been notified by the Clerk of the Court regarding

the Court's order of July 21, 1941, until about the first part of September 1941); thereafter the right to adduce this evidence was denied the petitioner when the Court below, the term of office of Smith having expired, entered a resettled order of October 14, 1941, in place of its order of July 21, 1941. Subsequently the Board denied a similar motion by petitioner prior to the resumed hearings, and the trial examiner at the resumed hearings also excluded such evidence * (X, 4347, 4457, 64).

The Court below on the second petition for review erroneously dismissed petitioner's contentions with the conclusion that they were without merit and had been disposed of in the previous opinion (XII, 4854); *Berkshire Knitting Mills v. N. L. R. B.*, 139 F. (2d) 134, 136 (C. C. A. 3rd, 1943).

We believe that the Board and the Court below erred to the prejudice of the petitioner in refusing petitioner the opportunity to present evidence which it deemed material and in failing to take the testimony concerning Smith's activities in this case. As stated by Mr. Chief Justice Stone in his dissenting opinion in *Pittsburgh Plate Glass Co. v. N. L. R. B.*, 313 U. S. 146, 177 (1941):

> "One of the most important safeguards of the rights of litigants and the minimal constitutional requirement, in proceedings before an administrative agency vested with discretion, is that it cannot rightly exclude from consideration facts and circumstances relevant to its inquiry which upon due consideration may be of persuasive weight in the exercise of its discretion."

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* Contrast the Board's refusal to receive in evidence those portions of the report of the Special Committee of the House of Representatives Investigating Labor Board and Wagner Act which are pertinent to the case at bar, with the action of the Board in receiving in evidence over petitioner's objection reports of congressional committees, being Board's Exhibits 61 (V, 2221), 62 (V, 2222), 64 (V, 2223) and 65 (V, 2220).

It was error for the Board and the Court below to have excluded this vital and material evidence which indisputably shows that the petitioner was prejudiced by the biased and prejudging activities of a Board member, namely Smith, and his subordinates, and that material evidence was knowingly suppressed which would have shown that the strike was caused solely by economic issues and not unfair labor practices.

Whether or not the Board would have reached a different conclusion on a hearing *de novo* is immaterial. Every litigant is entitled to a full, fair and impartial hearing, and a decision should not be made until all competent and material evidence offered by the litigants has been received and considered. *Donnelly Garment Co. v. N. L. R. B.*, 123 F. (2d) 215 (C. C. A. 8th, 1942).

Edwin S. Smith could not have been a fair and an impartial judge of the dispute that came before him in this case in view of his writings and actions as appears in the petition to adduce, and furthermore, petitioner could not be said to have had a fair, full and impartial hearing if your Honorable Court considers the other factors in the case which do not appear in the present record but are fully set forth in the petition to adduce, showing an interest and activity on the part of the designated parties to see that a case was made out against the petitioner.

The petitioner's petition to adduce after-discovered evidence sets forth the testimony taken before the Smith Committee with relation to the case at bar. On this testimony the Smith Committee, in its report to the House of Representatives (see Volume 4, pages 458, 459, 461 Verbatim Record of the Proceedings of House Committee Investigating Labor Board and Wagner Act, published in 1941 by The Bureau of National Affairs, Inc.), specifically found that Board member Smith aided in the promotion of a boycott against petitioner during the pendency of this cause before the Board; that his "conduct reveals an absence of that judicious and impartial temperament which the

American people demand from their quasi-judicial officers''; that the Board deliberately aided and abetted the promotion of industrial strife by refusing to proceed with the issuance of the complaint and the holding of a hearing because the union felt that ''there is a strong possibility of a general strike developing'', and that this attitude of the Board was utterly incompatible with the duties of the Board members as impartial, quasi-judicial officers.

The setting aside of the Board's decision and order dated November 3, 1939, and the reconsideration of the *original record* by the Board, in which a change of membership had occurred, did not remedy the harm done to petitioner. The procedure adopted in this case merely gave the Board an opportunity, after reviewing the case on an old record, to whitewash the biased activities of Board member Smith and some of the Board's subordinates and to bolster generally the findings which it had made in its first decision and to eliminate in a few instances certain findings which had been improperly included in the first order. The old record, tainted by the activities of Board member Smith and some of its subordinates, was still before it for consideration.

The petitioner from the inception of this case has never had a full, fair and impartial trial, and this denial of petitioner's constitutional right can only be cured by a hearing *de novo*.

Petitioner, like any litigant, is entitled to ''equal justice under the law'' and should be afforded an opportunity to adduce its material and relevant evidence.

(b) The petitioner was prejudiced by the conduct of the trial examiners.

The trial examiner at the first hearing did not conduct the case free from bias or with a desire to accord the litigants equal consideration. *Inland Steel Co. v. N. L. R. B., supra.*

Trial Examiner Kriz at the first hearings relaxed the rules of evidence when opposing counsel examined witnesses but applied them strictly against counsel for petitioner (VI, 2543, 4), even permitting the Board to clutter the record with irrelevant matters (V, 2035, 2050, 2058; VI, 2530). He admitted documents offered by the Board into evidence without looking at them (II, 683, 4; V, 2175) and further evidenced his bias by remarks and permitting strikers to applaud and hiss and boo during the hearings (V, 2066, 7; V, 2431; VII, 3459). Moreover, he permitted counsel for the striking union to cross-examine witnesses on matters not related to the union (IV, 1518, 9) while limiting counsel for the Intervenor to the extent that the proceedings pertained to the independent union. (II, 608.)

The rulings of Trial Examiner Riemer at the second hearings in 1942 were also prejudicial to the petitioner. His rulings on the petitioner's offer to introduce into evidence the relevant portions of the aforesaid congressional investigation deprived the petitioner of that fair and impartial hearing to which it was entitled. Likewise, he erred in not permitting counsel for petitioner to examine the minutes produced by witness Adams to determine what minutes related to the cause of the strike of 1936 or to examine the minutes himself. Contrast this action with what the Board did at the first hearing under its subpœna duces tecum on the independent union, when it took possession of all of the records of the independent union, examined them and placed in evidence every document on record which served the Board's purpose (I, 436). Notwithstanding the fact that this prior action was called to the attention of Trial Examiner Riemer, he still did not accord petitioner's counsel the similar privilege (X, 4173).

Prejudicial conduct on the part of trial examiners has frequently been the basis for setting aside an order of the Board and the granting of a new trial. *Inland Steel Co. v. N. L. R. B., supra; Montgomery Ward & Co. v. N. L. R. B.*, 103 F. (2d) 147 (C. C. A. 8th, 1939); *N. L. R. B.*

Washington Dehydrated Food Co., 118 F. (2d) 980 (C. C. A. 9th, 1941); *N. L. R. B. v. Phelps,* 136 F. (2d) 562 (C. C. A. 5th, 1943). See also *Donnelly Garment Co. v. N. L. R. B., supra,* where the case was remanded to the Board for further proceedings.

(c) Unwarranted delays of the Board deprived petitioner of a prompt hearing.

Due process of law not only requires a full, fair and impartial hearing, but also a prompt hearing. *N. L. R. B. v. National Casket Co.,* 107 F. (2d) 992 (C. C. A. 2nd, 1939). Long and unnecessary delays constitute an obvious hardship to an employer defending a charge of unfair labor practice.

An examination of the chronological history of the proceedings in this case as detailed in pages 2 to 7 of the foregoing petition will show that the Board inordinately delayed the prosecution of this case from its inception on January 20, 1937, to January 12, 1943. The petitioner only twice asked for continuances in the case, and both requests were refused (I, 27, 28, 209, 211).

As the Court below stated in its opinion: "This case bids fair for the unenviable distinction of being the Jarndyce v. Jarndyce of labor law." (XII, 4853.) A proceeding which has already extended over seven years because of inexcusable delays does not satisfy the constitutional requirement of a prompt hearing.

We further submit that the Court below erred in not deciding the petition to adduce at the time that it was presented instead of continuing the petition until argument of the case on the merits. If the Court below had determined the petition to adduce at that time in the same manner as it subsequently did in its opinion of June 19, 1941, the question of the propriety of the resettled order would never have arisen, for the testimony concerning the activities of Edwin S. Smith, we assume, would have been taken during that interval.

In conclusion, we submit that fair play is as binding, if not more binding, on administrative agencies as it is upon courts since many of the safeguards of court proceedings have been relaxed in the interests of supposed administrative efficiency.

Litigants are entitled to the "inexorable safeguard of a full, fair, prompt and impartial hearing" and if bias, prejudice and impartiality have been shown, they are entitled to a hearing *de novo*. "Once partiality appears . . . it taints and vitiates all the proceedings and no judgment based on them may stand": *N. L. R. B. v. Phelps, supra,* at 564.

II. The Finding of the Board That the Strike of 1936 Resulted From Unfair Labor Practices Is Unsupported by Substantial Evidence.

The Board failed to show affirmatively that the strike was caused by an unfair labor practice, but, on the contrary, the evidence shows that the strike was caused solely by economic controversies unrelated to any unfair labor practice.

All of the testimony presented at the hearings with regard to unfair labor practices related to isolated incidents during a period from 1933 to 1937. The Board adduced no testimony to show that the strike was called because of any of these incidents, which the Board has found to constitute unfair labor practices, or that the strike was prolonged by any of the incidents during the strike. On the contrary, the evidence shows that the strike was called solely for economic reasons relating to the possible economic betterment of the employees.

This conclusion is substantiated by a consideration of:

(1) The strike letters (PX 1, III, 1068-71; IX, 4022-5; PX 2, III, 1079-80; IX, 4025-6);

(2) The testimony of Board's witnesses Englehart, (III, 1068-72, 1079-80); Ammarell (IV, 1796-7); Adams

(X, 4329, 30, 64, 5); petitioner's employees (IV, 1604; V, 2085; IV, 1479; IV, 1628)*:

(3) Documentary evidence submitted in the case:

(a) Letter from the Federation to Hemmerich, dated September 14, 1936 (PX 1, IX, 4022);

(b) Letter from Branch 10 to Hemmerich, dated September 22, 1936 (PX 2, IX, 4025);

(c) Issue of "Picket Line News", dated October 13, 1936 (PX 7, IX, 4030);

(d) Circular letter dated December 10, 1936, issued by Federated Trades Council (BX, 19-5, VIII, 3943-6);

(e) Letter to Governor Earle from Payne, dated October 5, 1936 (BX 93, IX, 3994);

(f) Letter from Branch 10 to Werner, dated September 14, 1936 (INX 9, IX, 4117);

(g) Letter from Branch 10 to Werner, dated September 22, 1936 (INX 10, IX 4119);

(h) Minutes of Branch 10 Executive Board (PX_2 6, X, 4477-99);

(i) Minutes of Berkshire Division (PX_2 8, X 4500-23);

(j) Radio Address delivered by Rieve, President of American Federation of Hosiery Workers, on October 16, 1936 (after strike had begun) (PX 12, X 4552-59).

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* While the Board stated in footnote 37 of its decision (XI, 4754) that it has not relied on the testimony of Englehart, Ammarell, and Payne, who "testified in general terms that the strike was caused by the respondent's fostering of the Association, as well as by various alleged acts of discrimination against Federation members which had been reported to them but which are not shown by the record to have occurred", it has not specifically stated what testimony of these witnesses is not relied upon and what testimony, if any, the Board may have relied upon.

This testimony shows that the striking union certainly never considered that any unfair labor practice was the cause of the strike. Under these circumstances, the Board should not be permitted to make a finding of a fact which is unsupported by substantial evidence and which did not exist in the minds of the persons responsible for the strike. Findings must be based on substantial evidence.

III. The Board's Back Pay Order Should Not Include Time Lost Through Prolonged Delays of the Board and Branch 10.

Back pay orders may not be punitive or disciplinary but, as indicated in Section 10 (c) of the Act, should be entered solely for the purposes of effectuating the policies of the Act. Public interest, not the private rights of employees, is the determining factor.

Public interest requires that proceedings under the Act be disposed of with promptness and dispatch; yet in this case over seven years have elapsed since the strike of 1936 and the filing of charges with the Board in January of 1937.

In *N. L. R. B. v. Electric Vacuum Cleaner Co., Inc.*, 315 U. S. 685 (1942) your Honorable Court, in enforcing a back pay order notwithstanding employer's objection to the Board's delay, stated, at page 698:

> "There is nothing in the record, beyond a failure of the Board to file an intermediate report, which would tend to justify us, however, in shortening the period for compensation."

Your Honorable Court, we believe, has thus indicated that, if there had been facts in the record showing unconscionable delay on the part of the Board, then the back pay order would have been adjusted accordingly.

In this case the record is replete with facts which would justify such an adjustment as will appear from a review of

the chronological history appearing in paragraph thirty-three of petitioner's petition to review and set aside Board's order (XII, 4837, 8, 9).

See also *N. L. R. B. v. Crowe Coal Co.*, 104 F. (2d) 633 (C. C. A. 8th, 1939) where it was recognized that the present question might be raised in a subsequent case. There the Court said on page 641:

> "Undoubtedly cases may arise where time may be taken to enhance back pay recovery. Such cases must be met when presented."

An employer should not be penalized for the carelessness, inattention, or wilful delay of the Board and of the striking union beyond that by which is reasonably necessary to conclude a case.

The petitioner has not committed any unfair labor practice and should not be required to pay any back pay orders. However, if it is held that reinstatement is proper, the order should be modified so as to eliminate the periods of time lost through the delays of the Board and Branch 10, and no order should be prior at least to the date of the present final order of the Board of January 12, 1943.

Conclusion.

We, therefore, submit that the petitioner was not given a full, fair, prompt and impartial hearing; that the testimony if taken of Board member Edwin S. Smith would have disclosed a biased and partial judge and other prejudicial activities; that the strike of 1936 was not caused by any unfair labor practice by the petitioner; that even if reinstatement and back pay order is proper, the order should be modified so as to eliminate periods of time lost through delays of the Board and the striking union; that the United States Circuit Court of Appeals for the Third Circuit erred in affirming the order of the National Labor

Relations Board; and that the petitioner's prayer for writ of certiorari should be granted.

Respectfully submitted,

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Philadelphia, Pennsylvania,
April 20, 1944.